Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

MAJOR JOHN R. LARSON,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

Timothy M. Cox
Captain, U.S. Air Force
Counsel of Record

Shannon A. Bennett
Major, U.S. Air Force
Air Force Appellate
Defense Division
112 Luke Ave, Ste 343
Bolling AFB, DC 20032
(202) 767-1562

QUESTION PRESENTED

In *O'Connor v. Ortega*, 480 U.S. 709 (1987), the plurality and concurrence disagreed that the reasonableness of a government employee's expectation of privacy changes according to the Government's identity at the time of its intrusion. Here, supervision could access Petitioner's password-protected work computer and monitor his use. However, law enforcement agents conducting a criminal investigation entered Petitioner's private, locked office and searched his computer without a warrant. Is evidence discovered in such a search admissible?

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Will Thomas DeVries, *Protecting Privacy in the Digital Age*, 18 BERKELEY TECH. L.J. 283, 294 (2003) 7

The Petitioner, Major John R. Larson, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on April 25, 2008.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, *United States v. Larson,* 66 M.J. 212 (C.A.A.F. 2008), is located at Appendix (App.) 1a. The order and judgment of the United States Air Force Court of Criminal Appeals, *United States v. Larson,* 64 M.J. 559 (A.F. Ct. Crim. App. 2006), is located at App. 22a.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on April 25, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (2000) and 10 U.S.C. § 867a(a) (2000).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

In this case, the police conducted a warrantless search of Petitioner's workplace computer that he kept in his locked, private office and protected with a password known only to him.

Petitioner, an Air Force officer, worked as a satellite communications specialist at Schriever Air Force Base (AFB) in Colorado Springs, Colorado. In July 2002, the Colorado Springs Police Department arrested him at a local mall, after an internet sting operation identified him as a potential child sexual predator. Following his arrest, the Air Force Office of Special Investigations (AFOSI), which had coordinated with the Colorado Springs Police Department's investigation and arrest, went to Petitioner's office and seized his workplace computer, without a warrant. AFOSI subsequently searched the computer, also without a warrant, and found sexually explicit photographs and movies on it.

The computer was located in Petitioner's private office, reserved for his exclusive use during his assignment at Schriever AFB. He was allowed to and did lock the office in his absence. Thus, it was locked at the time AFOSI arrived to seize his computer. No one else had a key to his office except the fire department and building manager. In fact, AFOSI had to summon the fire department to open Petitioner's door to seize his computer even though

Petitioner's commanding officer was present at the time of the seizure.

Additionally, Petitioner secured the computer with a personal password known only to him. No one else used his computer, although his commanding officer and a network administrator could access the computer and any files not protected by a password if they so desired. The commanding officer, however, had never done so during Petitioner's assignment. Furthermore, the evidence did not suggest that the network administrator had ever accessed Petitioner's computer in his time at Schriever AFB either.

To use his computer, Petitioner had to acknowledge certain conditions listed in an on-screen banner that appeared when he logged-on. The banner stated that the computer was property of the Department of Defense, was for official use and not illegal activity, and was subject to monitoring. The banner did not state that users were subject to monitoring by law enforcement. Notwithstanding this banner, Petitioner's commanding officer permitted personal use of the government computers so long as it did not interfere with the performance of official duties.

Petitioner was charged with attempted carnal knowledge with a minor, attempted indecent acts with a minor, communicating indecent language, using a facility or means of interstate commerce to attempt to entice a minor to engage in sexual activity, and violating a lawful general regulation prohibiting the viewing of sexually explicit images on a government computer. The latter charge was

based solely on the images found during the warrantless search of his computer.

He moved to suppress the results of AFOSI's search prior to trial, asserting that the agents required a warrant. The military judge denied the motion. According to the military judge, the on-screen banner, the network administrator's ability to access the computer, and the government's ownership of the computer precluded Petitioner from having a reasonable expectation of privacy in the computer. Thus, a warrant was unnecessary.

The Air Force Court of Criminal Appeals affirmed. It held that since the evidence did not demonstrate that Petitioner was even aware of the existence of the files AFOSI discovered during its search, he could not have entertained a subjective expectation of privacy in them. Moreover, the court noted that the computer automatically stored the files as part of its operating system and the Petitioner would not be taking the computer with him at the conclusion of his assignment. As such, the court reasoned that Petitioner could not expect the contents of the computer to remain private. The Air Force Court thus concluded that the military judge did not abuse his discretion in denying Petitioner's motion to suppress. App. 30a-31a.

The Court of Appeals for the Armed Forces granted review of the case to consider AFOSI's warrantless search of Petitioner's computer and affirmed the Air Force Court of Criminal Appeals' decision. App. 1a-21a. The court held that Military Rule of Evidence 314(d) creates a "rebuttable presumption" "that there is no reasonable

expectation of privacy in government property," and that Petitioner did not rebut the presumption. First, the court faulted Petitioner for not testifying, thus concluding that he failed to show a subjective expectation of privacy. Regardless, "the access to this computer by both [Petitioner's] commander and the system administrator" validated the presumption against Petitioner's expectation of privacy. Furthermore, the court found that Petitioner, by virtue of the on-screen banner, was on notice that he could not use the computer for illegal activity and that "there could be third-party monitoring." Accordingly, the court concluded that Petitioner had no expectation of privacy in materials on his government computer.

The lower courts did not discuss the fact that it had been law enforcement agents rather than Petitioner's supervisor who intruded into his workplace computer.

REASONS FOR GRANTING THE WRIT

This Court should grant this petition to resolve the conflict between the plurality and concurring opinions in *O'Connor v. Ortega*, 480 U.S. 709 (1987), regarding public workplace searches, and more specifically, a government employee's expectation of privacy in the government workplace. Answering the question presented will impact this country's more than 21 million federal, state, and local government employees as well as provide critical guidance to countless law enforcement agencies. *See* U.S. Census Bureau, *2002 Census of Governments, Volume 3, Number 2. Compendium of Public*

Employment: 2002 GC02(3)-2, U.S. Government Printing Office, at 1 (September 2004).

The *Ortega* plurality suggested that the reasonableness of a government employee's expectation of privacy depends, in part, on the status of the Government at the time of the intrusion, i.e., whether the Government is acting as employer or as sovereign. *Id.* at 717. Justice Scalia's concurring opinion disagreed, asserting instead that "[t]he identity of the searcher (police v. employer) is [not] relevant [] to whether Fourth Amendment protections apply." *Id.* (Scalia, J., concurring). Moreover, he feared that the plurality's decision failed to provide "police officers" with a "clue" as to how to assess a public employee's expectation of privacy in the Government workplace. *Id.* at 729 (Scalia, J., concurring).

Ortega specifically addressed a work-related intrusion by the Government as employer and not a criminal investigation conducted by the police. *See id.* at 723. With the increasing ubiquity of computers and other technology in the workplace comes a need for a "clue" in such investigations. *Cf.* United States General Accounting Office, General Accounting Office: Employee Privacy: Computer-Use Monitoring Practices and Polices of Selected Companies, SEVENTH ANNUAL INTERNET LAW INSTITUTE, at 1049, 1058 (PLI Patents, Copyrights, Trademarks, and Literary Prop. Course, Handbook Series No. 755, 2003) (noting increase of computers in the workplace from eighteen percent in 1998 to almost forty-two percent in 2001). As one commentator has written, the "digital age has

changed crime and criminal investigation." Will Thomas DeVries, *Protecting Privacy in the Digital Age*, 18 BERKELEY TECH. L.J. 283, 294 (2003).

The Eleventh Circuit has just recently expressed concern that the Fourth Amendment's application in the government workplace is "unclear." *Reyes v. Maschmeier*, 446 F.3d 1199, 1203 (11th Cir. 2006). Proving this point, the Court of Appeals for the Armed Forces in this case did not attach any significance to the fact that AFOSI and not Petitioner's commanding officer conducted the search of the computer. The other federal appellate courts likely would have. None has squarely decided the question presented here, but their discussions of *Ortega* indicate support for the view that a government employee's expectation of privacy does depend on the status of the Government at the time of the intrusion. *See, e.g., Vega-Rodriguez v. Puerto Rico Tel. Co.*, 110 F.3d 174, 180 (1st Cir. 1997); *Gudema v. Nassau County*, 163 F.3d 717, 722 (2d Cir. 1998); *Gossmeyer v. McDonald*, 128 F.3d 481 (7th Cir. 1997); *United States v. Thorn*, 375 F.3d 679 (8th Cir. 2004), *vacated on other grounds*, 543 U.S. 1112 (2005); *United States v. Jones*, 286 F.3d 1146 (9th Cir. 2002); *Reyes*, 446 F.3d 1199.

Petitioner's work environment was hardly unique. Like Petitioner, many of the millions of government employees in this country certainly have private offices, enjoy the ability to lock their offices when not there, and use password-protected computers owned by the Government they know supervision can monitor. The question presented by this case is thus timely, relevant, and appropriate to make what is

"unclear" clear. Granting this petition will eliminate what the Fifth Circuit has characterized as a "need to tread lightly in this relatively new area of Fourth Amendment jurisprudence." *United States v. Slanina*, 283 F.3d 670, 680 n.8 (5th Cir. 2002), *vacated on other grounds by* 537 U.S. 802 (2002).

I.

CONTRARY TO THE COURT OF APPEALS FOR THE ARMED FORCES, THE FEDERAL CIRCUIT COURTS OF APPEALS SUGGEST THAT THEY WILL ENDORSE THE VIEW THAT THE LAW ENFORCEMENT STATUS OF THE INDIVIDUAL MAKING THE INTRUSION IS RELEVANT TO A GOVERNMENT EMPLOYEE'S EXPECTATION OF PRIVACY.

The lower court never discussed the significance, if any, of AFOSI agents' law enforcement status or their criminal investigation on Petitioner's expectation of privacy in his computer. By failing to do so, the Court of Appeals for the Armed Forces has implicitly adopted an approach that conflicts with that of other federal appellate courts. Although they have not decided the precise question presented, other federal courts have shown that the Government's status at the time of a workplace intrusion is relevant to the question of a government employee's expectation of privacy.

For example, the Ninth Circuit recognized "a less heightened standard of review for public employer

searches" than for police searches. *See United States v. Jones*, 286 F.3d 1146, 1150 (9th Cir. 2002). The Second Circuit has explained that "neither a warrant nor probable cause is required when a government entity conducts a reasonable search acting in its capacity as employer rather than law enforcer." *Gudema v. Nassau County*, 163 F.3d 717, 722 (2d Cir. 1998). The Seventh Circuit apparently will require a warrant when law enforcement conducting a criminal investigation, as opposed to an internal misconduct inquiry conducted by supervision, searches a government employee's workplace. *See Gossmeyer v. McDonald*, 128 F.3d 481, 492 (7th Cir. 1997) (noting that the "presence of so many [law enforcement] officials . . . did not transform an agency's work-related search into a criminal search requiring probable cause and a warrant"). Similarly, the Eighth Circuit, in *United States v. Thorn*, 375 F.3d 679, 685 (8th Cir. 2004), *vacated on other grounds*, 543 U.S. 1112 (2005), upheld a warrantless, work-related search because "[a]t no time did the agency's investigation into Thorn's work-related misconduct devolve into a de facto criminal investigation that should have been conducted pursuant to a warrant." The First Circuit observed that the "precise extent of an employee's expectation of privacy often turns on the nature of an intended intrusion," implying that a reasonable expectation of privacy exists against a criminal investigation but not necessarily as to a work-related intrusion. *See Vega-Rodriguez v. Puerto Rico Tel. Co.*, 110 F.3d 174, 180 (1st Cir. 1997). Finally, the Eleventh Circuit in *Reyes*, 446 F.3d at 1204 n.5, noted that it would "distinguish between the

government as law enforcer and government as employer" to resolve a 42 U.S.C. § 1983 claim, thus demonstrating the relevance of law enforcement's involvement in a workplace intrusion.

Even more directly, a United States District Court ruled in *Konopka v. Borough of Wyoming*, 383 F. Supp. 2d 666, 679 (M.D. Pa. 2005), that a government employee had a reasonable expectation of privacy because "a law enforcement official . . . committed the intrusion."

Granting review of this case will enable this Court to establish uniformity of the law impacting over 21 million government employees and will directly affect law enforcement's ability to conduct criminal investigations in the government workplace.

II.

THE GOVERNMENT AS EMPLOYER IS DIFFERENT THAN THE GOVERNMENT AS SOVEREIGN.

When acting as an employer, the Government may need to make "reasonable intrusions" to ensure the proper and efficient work of the Government. *Ortega*, 480 U.S. at 724. But law enforcement's "job is the detection of crime and the arrest of criminals." *McDonald* v. *United States*, 335 U.S. 451, 455-56 (1948). The two identities of the Government are different with different interests and priorities.

In *Mancusi v. DeForte*, 392 U.S. 364, 369 (1968), this Court suggested that an employee in the private sector can enjoy a reasonable expectation of privacy vis-à-vis law enforcement even if not vis-à-vis his

supervisor. If true, then a government employee should have the same expectations. *See Ortega,* 480 U.S. at 731 (Scalia, J., concurring).

This Court has already established that public employees have a "diminished expectation of privacy with respect to office privacy." *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 671 (1989). When it comes to law enforcement, however, it cannot be forgotten that although the Fourth Amendment limits governmental conduct, *see Walter v. United States*, 447 U.S. 649, 656 (1980), its "origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority," *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). Indeed, "[a] citizen's expectation of privacy against unreasonable government intrusions is at its most robust when the intruder is a police officer." *Rossi v. Town of Pelham*, 35 F. Supp. 2d 58, 67 (D.N.H. 1997) (citing *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 394 (1971)). Thus, because of the differences between the Government as employer and the Government as sovereign, this Court has always "assumed" that "the government as employer . . . has far broader powers than does the government as sovereign." *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion).

Accordingly, the factors the lower court identified in this case as to why Petitioner did not have a reasonable expectation of privacy take on an entirely different light. While they might conceivably militate against an expectation of privacy vis-à-vis Petitioner's Government employer, they do evince a

privacy interest "too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals." *McDonald*, 335 U.S. at 455-56.

A. Public employees can have private offices and do lock their office doors.

Many public employees have private offices they are able to lock. An employee who essentially has exclusive use of an office and the ability to lock his door when absent evinces a subjective expectation of privacy. *See, e.g., United States v. Ziegler*, 474 F.3d 1184, 1190 (9th Cir. 2007); *Slanina*, 283 F.3d at 676 (finding government employee showed a subjective expectation of privacy because "he had closed and locked the door to his office"). And under such circumstances, society would be prepared to accept that expectation of privacy, at least with respect to law enforcement, as reasonable. *See Mancusi*, 392 U.S. at 369. A supervisor or building manager in possession of a master key does not destroy this expectation. Otherwise, the existence of such a key would overcome the legitimate privacy interest of any hotel, office, or apartment occupant. *United States v. Taketa*, 923 F.2d 665, 672-73 (9th Cir. 1991).

B. Mere access to a public employee's work computer by a supervisor or technician does not necessarily render an expectation of privacy unreasonable.

While the lower court also noted Petitioner did not have a reasonable expectation of privacy because of

his supervisor's and the network administrator's ability to access to the computer, the evidence did not demonstrate that the supervisor or administrator ever did access the computer. More importantly, the lower court did not claim that any such access made Petitioner's computer "so open to fellow employees or the public that no expectation of privacy [was] reasonable." *Ortega*, 480 U.S. at 718. Indeed, even some access by an employer, co-worker, or supervisor does not make an employee's expectation of privacy unreasonable. *See Slanina*, 283 F.3d at 676 (explaining that the ability of a select few of the defendant's co-workers to access his office did not defeat his reasonable expectation of privacy); *Leventhal v. Knapek*, 266 F.3d 64, 74 (2d Cir. 2001) (finding that government employee's expectation of privacy was reasonable as state agency's access to computer did not appear to be frequent, widespread, or extensive); *Taketa*, 923 F.2d at 672-73 (rejecting argument government employee lacked a reasonable expectation of privacy because regulation authorizing inspection had not been enforced). Whatever such access has on an employee's expectation of privacy vis-à-vis his employer is a different question than the expectation vis-à-vis law enforcement. The Government-employer might access the workplace to retrieve a document or file to effectuate the Government's business. That is a far cry from law enforcement retrieving a document or file as evidence of criminal activity.

C. Public employees use government-owned property to conduct their work.

The lower court began its analysis in Petitioner's case by noting that the Government owned the computer that AFOSI searched. The lower court overemphasized the Government's property interest in the computer, and Petitioner's lack thereof. This Court has countenanced that privacy interests protected by the Fourth Amendment do not turn on ownership. *See, e. g., Rakas v. Illinois*, 439 U.S. 128, 143 (1978) (stating that the "protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place"); *Katz v. United States*, 389 U.S. 347, 353 (1967) (deciding that the Fourth Amendment protects people and not simply "areas"); *United States v. Salvucci*, 448 U.S. 83, 93 (1980) (observing that this Court "must . . . engage in a conscientious effort to apply the Fourth Amendment by asking not merely whether the defendant had a possessory interest in the items seized, but whether he had an expectation of privacy in the area searched."). Following the lower court's reasoning, no government employee could claim a reasonable expectation of privacy in government-owned property in the workplace even if the employee enjoyed essentially exclusive use of the property. *Ortega*'s recognition of an expectation of privacy in the government workplace consequently becomes illusory.

D. Even if engaged in illegal conduct, a government employee does not enjoy any lesser expectation of privacy.

Finally, the lower court cited the log-on banner as a circumstance negating Petitioner's reasonable expectation of privacy. Although the banner warned the user that illegal use of the computer was prohibited, such a warning does not effect a person's expectation of privacy. Otherwise, doing something one is not supposed to do would give law enforcement license to search and seize as it pleased. This is not the law. As this Court recognized in *Horton v. California*, 496 U.S. 128, 137 n.7 (1990), "even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure." Were it not for that basic rule, "no lawbreaker would have a subjective expectation of privacy in any place because the expectation of arrest is always imminent." *United States v. Gooch*, 6 F.3d 673 (9th Cir. 1993); *see also United States v. Whaley*, 779 F.2d 585, 590 n.8 (11th Cir. 1986) (noting that "a person [] engaged in criminal conduct within his home does not, standing alone, destroy a homeowner's expectation of privacy").

Similarly, while the banner put Petitioner on notice that his use was subject to monitoring, it did not suggest that the monitoring was for a law enforcement purpose. Employers undoubtedly may wish to monitor their employees' use of a computer as a means to discover work-related employee misfeasance, but that is a "substantially different"

intrusion than law enforcement seeking to detect criminal activity.

E. Conclusion

If a government employee's "expectation of privacy must be assessed in the context of the employment relation," *Ortega*, 480 U.S. at 717, then the Government's status at the time of the intrusion becomes significant. In situations like Petitioner's, the police do not have an employment relationship with the individuals that it searches. Accordingly, what might be permissible for the Government as employer might not for the Government as law enforcement. *Cf. Churchill*, 511 U.S. at 671. In fact, the Government's status may very well be determinative. *See Ortega*, 480 U.S. at 729 (Scalia, J., concurring). Supervisors and law enforcement, as do the courts, need to know.

Petitioner's military status does not affect the analysis. His workplace was not a hangar, bunker, or tent in a combat zone, *see United States v. Long*, 64 M.J. 57, 62 (C.A.A.F. 2006), but rather had all the trappings associated with a civilian government employee's private office. And, his military commander, whose has more authority and power than a civilian counterpart, *see id.*, did not conduct the search – law enforcement did. The Court of Appeals for the Armed Forces did not identify any uniquely military interest justifying its conclusion that Petitioner lacked a reasonable expectation of privacy. Indeed, its analysis compels the conclusion that the Colorado Springs Police Department, a law enforcement agency not associated with the military,

would not have required a warrant to search Petitioner's computer either.

In sum, many government employees are similarly situated as Petitioner. They work in offices in which co-workers and supervisors enter, even frequently. They work on government-owned computers that the employees know supervision can monitor. *Cf. Muick v. Glenayre Electronics*, 280 F.3d 741, 743 (7th Cir. 2002) (noting that "the abuse of access to workplace computers is so common . . . that reserving a right of inspection is so far from being unreasonable that the failure to do so might well be thought irresponsible"). Thus, the different interests the Government has as employer as compared to when it acts as law enforcement raise the important, unanswered question of whether "the nature of the [Government's] intrusion can affect whether a person has a reasonable expectation of privacy [such that] a person may not have such an expectation from one type of search, [but] he or she reasonably may expect privacy with respect to another." *Trujillo v. City of Ontario*, 428 F. Supp. 2d 1094, 1103 (C.D. Cal. 2006).

CONCLUSION

This Court should grant certiorari to provide the necessary guidance "in this relatively new area of Fourth Amendment jurisprudence" so that government employees, their supervisors, the police, and the courts need not "tread lightly." *See Slanina*, 283 F.3d at 680 n.8. And in doing so, it will resolve the competing plurality and concurring opinions in

Ortega and a probable split of authority among the federal appellate courts.

For the foregoing reasons, Petitioner respectfully requests that this Honorable Court grant his petition for a writ of certiorari.

Respectfully submitted,

TIMOTHY M. COX
Captain, U.S. Air Force
Counsel of Record

SHANNON A. BENNETT
Major, U.S. Air Force

AF Legal Operations Agency
Appellate Defense Division
112 Luke Ave, Ste 343
Bolling AFB, DC 20332-8000
(202) 767-1562

Counsel for Petitioner

Appendix

UNITED STATES, Appellee

v.

John R. LARSON, Major,

U.S. Air Force, Appellant

UNITED STATES
COURT OF APPEALS FOR
THE ARMED FORCES

66 M.J. 212

November 27, 2007, Argued

April 25, 2008, Decided

OPINION BY: RYAN

OPINION

Judge RYAN delivered the opinion of the Court.

A general court-martial composed of officer members convicted Appellant, contrary to his pleas, of one specification each of attempted carnal knowledge and attempted indecent acts with a minor, violations of Article 80, Uniform Code of Military Justice (UCMJ), *10 U.S.C. § 880 (2000)*; one specification of violating a lawful general regulation, a violation of Article 92, UCMJ, *10 U.S.C. § 892 (2000)*; and one specification each of communicating indecent language and using a facility or means of interstate commerce to attempt to entice a minor to

engage in sexual activity, violations of Article 134, UCMJ, *10 U.S.C. § 934 (2000).*

The members sentenced Appellant to dismissal from the service, confinement for nine years, and forfeiture of all pay and allowances. The convening authority approved the dismissal and forfeitures, but reduced Appellant's confinement to six years. The United States Air Force Court of Criminal Appeals affirmed. *United States v. Larson, 64 M.J. 559 (A.F. Ct. Crim. App. 2006).*

We granted review of the following issues:

I.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN HOLDING THAT APPELLANT HAD NO REASONABLE EXPECTATION OF PRIVACY IN HIS GOVERNMENT COMPUTER DESPITE THIS COURT'S RULING IN *UNITED STATES v. LONG, 64 M.J. 57 (C.A.A.F. 2006).*

II.

WHETHER THE APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE *SIXTH AMENDMENT* AND *ARTICLE 27, UCMJ*, WHEN HIS CIVILIAN DEFENSE COUNSEL, IN HIS OPENING STATEMENT, DURING FINDINGS, AND AGAIN IN CLOSING ARGUMENT,

CONCEDED THE APPELLANT'S GUILT TO VARIOUS CHARGES AND SPECIFICATIONS. [1]

1 *65 M.J. 253 (C.A.A.F. 2007).*

After oral argument in November 2007, this Court specified the following related issues:

I.

IN THE MILITARY JUSTICE SYSTEM, IS THE DECISION TO CONCEDE GUILT TO ONE OF MULTIPLE CHARGED OFFENSES DURING ARGUMENT A TACTICAL DECISION THAT COUNSEL MAY MAKE WITHOUT OBTAINING CONSENT OF THE ACCUSED? *SEE FLORIDA v. NIXON, 543 U.S. 175, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004); UNITED STATES v. CARE, 18 C.M.A. 535, 40 C.M.R. 247 (1969); UNITED STATES v. BERTELSON, 3 M.J. 314 (C.M.A. 1977).*

II.

ASSUMING, ARGUENDO, THAT COUNSEL MAY CONCEDE GUILT AS A TACTICAL MATTER AFTER CONSULTATION BUT WITHOUT CONSENT OF THE ACCUSED, DOES THE RECORD IN THE PRESENT CASE SUPPORT A CONCLUSION THAT COUNSEL CONSULTED WITH

APPELLANT PRIOR TO MAKING SUCH A CONCESSION? IF NOT, WAS THE FAILURE TO DO SO PREJUDICIAL AS TO THE FINDINGS OR SENTENCE? *SEE STRICKLAND v. WASHINGTON, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).* [2]

2 *65 M.J. 449 (C.A.A.F. 2007).*

For the reasons stated below, we affirm the decision of the lower court.

I. Appellant's Motion to Suppress

A. Factual Background

Appellant used the government computer in his military office to obtain sexually explicit material, to include pornographic images and video, from the Internet and to initiate instant message conversations with "Kristin," someone he believed to be a fourteen-year-old girl. "Kristin" was actually a civilian police detective working to catch online sexual predators.

Civilian police and the Air Force Office of Special Investigations (AFOSI) cooperated in the investigation of Appellant. The police used a proposed meeting between Appellant and "Kristin" at a local mall as a sting operation. When Appellant arrived at the mall at the time he had arranged with "Kristin," the police arrested Appellant. While conducting a search incident to arrest the police discovered a receipt for a package of condoms purchased just fifteen minutes earlier in Appellant's

pocket. During a consensual search of Appellant's car, police found a package of condoms and a book entitled *Sexaholics Anonymous*.

After Appellant's arrest, AFOSI continued to pursue its own investigation. Appellant's commander, using a master key to the government office occupied by Appellant, allowed AFOSI agents to enter and to seize the government computer in the office. A search of the computer's hard drive revealed stored pornographic material, a web browser history that showed Appellant visited pornographic websites and engaged in sexually explicit chat sessions in his office on his government computer, and other electronic data implicating Appellant in the charged offenses.

At trial, Appellant asserted that the warrantless search of his government computer violated the *Fourth Amendment* and that the evidence obtained from it should be suppressed. The military judge held an Article 39(a), UCMJ, *10 U.S.C. § 839(a) (2000)*, session to determine the admissibility of the evidence. Based on the testimony elicited at the *Article 39(a), UCMJ*, session the military judge made initial findings of fact on the record and later made detailed supplemental findings of fact.

The military judge found that Appellant was assigned to a private office and had a key to lock the office, but other Air Force personnel, including the fire department and the command's facility manager also had keys to his office. The office contained a government computer that was provided to Appellant to accomplish official business. The

military judge found that Appellant could secure the computer with a personal password, but a system administrator could still access the computer. When Appellant logged on to the computer, he was required to click a button accepting conditions listed in a banner, which stated that the computer was Department of Defense property, was for official use, and that he consented to monitoring. The military judge found that, while Appellant "reasonably understood that he was allowed to send personal e-mail or visit the internet as long as it didn't interfere with [his] duties," this did not change the fact that the government owned the computer and had a right to access it. This finding was largely based on the testimony of Appellant's commander, who testified that he could log onto Appellant's computer with his own password and access all portions of the hard drive unless Appellant had protected something with his own password. Although the military judge did not specifically reference the commander's access in his findings, this testimony adds further support to the military judge's ultimate ruling. Moreover, no evidence was presented that any of the evidence recovered from the hard drive was password protected.

In light of these facts, the military judge ruled that the Government had established by a preponderance of the evidence that Appellant had no reasonable expectation of privacy in the government computer because the computer had a "consent to monitoring" banner that had to be acknowledged with each log on, the system administrator had access to every part of the computer, including the

hard drive, and the computer was government property.

B. *Fourth Amendment* Analysis

We review the denial of a motion to suppress for an abuse of discretion. *United States v. Khamsouk, 57 M.J. 282, 286 (C.A.A.F. 2002).* Findings of fact are affirmed unless they are clearly erroneous; conclusions of law are reviewed de novo. *United States v. Flores, 64 M.J. 451, 454 (C.A.A.F. 2007)* (citing *Khamsouk, 57 M.J. at 286*). We consider the evidence in the light most favorable to the prevailing party. *United States v. Reister, 44 M.J. 409, 413 (C.A.A.F. 1996).*

The military judge concluded that the Government had carried its burden of establishing that Appellant had no reasonable expectation of privacy in the government computer. The lower court agreed, and held that the military judge did not abuse his discretion. *Larson, 64 M.J. at 563.* We agree.

The *Fourth Amendment of the Constitution* generally requires probable cause for searches of places and things in which people have a reasonable expectation of privacy. *U.S. Const. amend. IV.* In addressing *Fourth Amendment* privacy claims, the threshold issue is whether the person has a legitimate expectation of privacy in the invaded place. *Rakas v. Illinois, 439 U.S. 128, 143, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978).* This inquiry invites a court to address whether the individual had a subjective expectation of privacy, and if so whether

the subjective expectation of privacy is one that society is prepared to accept as reasonable. *Smith v. Maryland, 442 U.S. 735, 740, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979), superseded by statute,* Electronic Communications Privacy Act of 1986, *18 U.S.C. § 3121(a) (2000)* (prohibiting installation of a pen register without a court order).

As the property searched here was a government computer, Military Rule of Evidence (M.R.E.) 314(d), which addresses the search of government property, pertains. It states:

> Government property may be searched under this rule *unless* the person to whom the property is issued or assigned has a reasonable expectation of privacy therein at the time of the search. Under normal circumstances, a person does not have a reasonable expectation of privacy in government property that is not issued for personal use. . . .

Emphasis added. The discussion to this rule recognizes that the presumption that there is no reasonable expectation of privacy in government property is rebuttable. *Manual for Courts-Martial, United States,* Analysis of the Military Rules of Evidence app. 22 at A22-26 (2005 ed.). Whether there is a reasonable expectation of privacy in government property is determined under that totality of the circumstances, which includes the rebuttable presumption. *See, e.g., Samson v. California, 547 U.S. 843, 848, 126 S. Ct. 2193, 165 L. Ed. 2d 250 (2006);* M.R.E. 314(d).

In this case, based on the totality of circumstances presented including the factors identified below, Appellant fails to rebut and overcome the presumption that he had no reasonable expectation of privacy in the government computer provided to him for official use. M.R.E. 314(d). There is no evidence Appellant had a subjective expectation of privacy in the government computer, and he did not testify that he did. *See Flores, 64 M.J. at 454* (factoring into the reasonable expectation of privacy analysis the fact that the accused did not testify on the motion to suppress). Moreover the access to this computer by both Appellant's commander and the system administrator supports the validity of the presumption that he had no reasonable expectation of privacy in the government computer.

Finally, the military judge found as fact that when Appellant used the computer "a banner appeared that state[d] that it was a DOD computer, it [was] for official use, not to be used for illegal activity. And that] [i]t also had a statement that users of the computer consent to monitoring." This factual finding is supported by the record, is not clearly erroneous and, taking the facts in the light most favorable to the prevailing party, establishes both that Appellant was put on notice that the computer was not to be used for illegal activity and that there could be third-party monitoring.

Appellant argues that this case is controlled by this Court's decision in *United States v. Long, 64 M.J. 57 (C.A.A.F. 2006)*, which he claims establishes that he had a reasonable expectation of privacy in his government computer. That reliance is

misplaced. We made clear in *Long* that our decision was rooted in the "particular facts of that case, [and] we conclude[d] that the lower court was not clearly erroneous in its determination that Appellee had a subjective expectation of privacy in the e-mails she sent from her office computer and in the e-mails that were stored on the government server." *Id. at 63.*

The present case is factually distinguishable from *Long*. *Long* rested in large part on the testimony of the command's network administrator: "the testimony of the network administrator [as to the agency practice of recognizing the privacy interests of users in their e-mail] is the most compelling evidence supporting the notion that Appellee had a subjective expectation of privacy." *Id.*

Here, unlike in *Long,* Appellant presented no evidence that he enjoyed an expectation of privacy in materials on his government computer. And, unlike in *Long,* the testimony of Appellant's commander and the military judge's findings of fact established both monitoring of and command access to the government computer.

Long does not control the decision here, and we agree with the CCA that the military judge did not abuse his discretion in concluding that Appellant had no expectation of privacy in the government computer. *Larson, 64 M.J. at 563.*

II. Appellant's Ineffective Assistance of Counsel Claim

A. Factual Background

As the trial on the merits began, the military judge instructed the panel that "the opening statements are the views of what both counsel believe the evidence will show you. The opening statements are not evidence in and of themselves." Included in Appellant's civilian defense counsel's opening statement to the members were the following comments about Appellant's use of his government computer:

> You're going to see that Major Larson was employed and used his computer in an inappropriate fashion. There's no question about that. That's not going to be an issue in this case. It's going to be conceded. Major Larson took his computer and used it inappropriately.
>
> You're going to hear that there is a regulation or rule that you are not to use your computer for particular purposes. . . . [I]t's not going to be the defense contention in this case that Major Larson -- that it was ever intended for Major Larson to get on the computer and start going into profiles and contacting individuals in chat rooms, and profiles, and downloading photos. . . . [T]hat is not going to be an issue in this case.

Civilian defense counsel ended his opening statement in a similar vein:

> But, when it gets down to the truth of this case -- and I'm not going to get up

> here and try to represent something to you that's not true -- Major Larson is guilty of misusing his computer because it was never anticipated by [Appellant's superiors] that he was to use that computer for those reasons. It wasn't, and he shouldn't have done that . . . . But, he certainly never attempted to do what they're claiming he did. And we're going to ask you at the conclusion of this case to find him not guilty of those charges and specifications.

As civilian defense counsel concluded his opening statement, the military judge again instructed the panel that "opening statements of both sides are simply their views and they are not evidence in and of themselves."

As the case approached its conclusion, and before closing arguments, the military judge repeated his instruction about the relationship of arguments and evidence in the case:

> You will hear an exposition of the facts by counsel for both sides as they view them. Bear in mind that the arguments of counsel are not evidence. Argument is made by counsel to assist you in understanding and evaluating the evidence, but you must make the determination of the issues in the case on the evidence as you remember it and apply the law as I instruct you.

In closing argument, civilian defense counsel argued, as relevant to the granted issues:

> In this case, Major Larson is presumed innocent. It's hard to think of innocence and the concept of being presumptively innocent or free of any guilt after you've had an opportunity to view some of [the] things that you see in this case. The despicable photographs, the downloaded pictures, some of the chats, the indecent language that was communicated, but the fact is, is that presumption of innocence is there and remains there, unless the prosecution proves every element of every charge beyond a reasonable doubt.
>
> . . . .
>
> . . . Major Larson has a problem in viewing sexually explicit materials. There's no question about that.
>
> I said to you in the opening that he violated -- he did not obey a lawful order and that's viewing sexually explicit material over the internet.
>
> . . . .
>
> . . . There are a lot of things that I've forgotten and there are a lot of issues that I won't necessarily raise and bring up and for that I'm sorry. And I apologize to my client if I forgot to mention things that are important, certainly, that you might

> feel they're important. But I know that each and every one [of] you are dedicated, your service here and I know that each one of you believe that it in order to do this job right, in order to make sure that this officer, and yes, an officer that made bad choices and bad decisions, and he disobeyed his lawful orders, and certainly communicated indecent language and he did things, and thinking this was in the privacy of his own office, but certainly took advantage of that and brought, I think, discredit upon the service, you know, a disreputable situation and for that I'm sure you can -- you know that this man is embarrassed and sorry for that.

Appellant's civilian counsel's argument, both in opening and closing, stressed that he did not contest the fact that Appellant improperly used a government computer. Appellant filed an affidavit with the CCA asserting that his civilian defense counsel did not consult him before making the decision to not contest that charge, and that this failure to consult amounted to a violation of his *Sixth Amendment* right to counsel. Appellant claimed that the arguments caused him to rule out the option of testifying.

That court ordered trial defense counsel to answer four specific questions, one of which was what specific discussions occurred between trial defense counsel and Appellant regarding concessions of fact concerning Appellant's guilt. Counsel

responded to the CCA's order, but did not answer the question.

Puzzlingly, the CCA accepted trial defense counsel's non-response and proceeded to determine that Appellant's counsel was not constitutionally deficient. *Larson, 64 M.J. 564.* Relying on an affidavit of civilian defense counsel that averred that the defense team concluded that there was no plausible defense to the *Article 92, UCMJ,* offense of wrongfully viewing sexually explicit images on the government computer, the lower court reasoned it would not "second-guess such tactical decisions made to seize and retain credibility with the members, particularly when, as here, the trial defense team's efforts are directed toward minimizing their clients punitive exposure." *Larson, 64 M.J. at 565.*

B. *Sixth Amendment* Analysis

1.

Defense counsel "undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy." *Florida v. Nixon, 543 U.S. 175, 187, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004)* (citing *Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); see also Pineo v. State, 2006 ME 119, PP 12-16, 908 A.2d 632, 638-39* (applying *Nixon* in a non-capital case). Whether the client must consent to the strategic decision made by counsel before counsel may proceed is a different question. *See Taylor v. Illinois, 484 U.S. 400, 417-18, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988)* ("Although

there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has -- and must have -- full authority to manage the conduct of the trial.") (footnote omitted).

In *Nixon,* the Supreme Court determined that, based on the facts of that case, an attorney who consulted with his client need not acquire the consent of the client before making the strategic decision to concede some or all aspects of a crime at trial in order to achieve an acceptable overarching strategic goal as long as the defendant "retained the rights accorded a defendant in a criminal trial." *543 U.S. at 188.* And federal courts have consistently held that "conceding guilt to one count of a multi-count indictment to bolster the case for innocence on the remaining counts is a valid trial strategy which, by itself, does not rise to the level of deficient performance." *United States v. Holman, 314 F.3d 837, 840 (7th Cir. 2002); see also United States v. Swanson, 943 F.2d 1070, 1075-76 (9th Cir. 1991)* (recognizing "that in some cases a trial attorney may find it advantageous to his client's interests to concede certain elements of an offense or his guilt of one of several charges"); *Clozza v. Murray, 913 F.2d 1092, 1100 (4th Cir. 1990)* (holding that because defense counsel's "remarks were largely attributable to trial strategy, we cannot, in keeping with *Strickland,* second-guess counsel's tactical choices" to concede).

Nor is it true, as Appellant contends, that this case falls outside of *Nixon* because trial defense counsel's actions in this case foreclosed a contested

trial on the charged offenses and were tantamount to a confession. [3] Just as in *Nixon,* the Government was still required "to present during the guilt phase competent, admissible evidence establishing the essential elements of the crimes . . . charged . . . .[,] the defense reserved the right to cross-examine witnesses . . . and . . . [did] endeavor . . . to exclude prejudicial evidence." *543 U.S. at 188.*

> 3 Nothing in *United States v. Bertelson, 3 M.J. 314 (C.M.A. 1977),* or *United States v. Care, 18 C.M.A. 535, 40 C.M.R. 247 (1969),* dictates a different result. In this case there was nothing analogous to a guilty plea or confessional stipulation that might have allowed the members to abdicate their duty to find Appellant guilty of every element of each of the charged offenses.

In this case, the Government presented evidence on all charges, covered all charges in its opening and closing argument, and the members were instructed on each charged offense by the military judge. Moreover, as noted by the military judge both before and after argument, counsel's statements during argument were not evidence; his statements did not relieve the Government of its burden of proof, inject new factual matters into the trial, or stand as the legal equivalent of a confession.

2.

If the evidence showed trial defense counsel had an in-depth discussion with Appellant regarding counsel's strategic choice, this might be a very

different case. *See Davenport v. Diguglielmo, 215 F. App'x 175, 181 (3d Cir. 2007)* (stating "[t]he Court in *Nixon* held 'counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent' as long as counsel informed the defendant of the strategy before he proceeded and it satisfied the *Strickland* standard" (quoting *Nixon, 543 U.S. at 192*)). But the response requested, and non-response accepted, at the lower court on the question whether such consultation took place do not inform this Court as to what, if any, discussions occurred, and if they did occur, what was said. Therefore we will assume deficient performance of counsel for failure to consult on the strategic decision to concede guilt in argument to one of the offenses charged and move on to determine whether Appellant was prejudiced. *See Strickland, 466 U.S. at 697* (stating that a court may "dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice"); *United States v. McConnell, 55 M.J. 479, 481 (C.A.A.F. 2001)* (stating the same).

Appellant argues that he was prejudiced by his civilian defense counsel's decision to concede his improper use of a government computer during argument because it ensured a guilty verdict with respect to the *Article 92, UCMJ*, charge and effectively prevented him from taking the stand in his own defense. Whether there was prejudice depends on whether there is "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)* (citations and quotation marks omitted). The

appellant bears the burden of demonstrating that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland, 466 U.S. at 694.*

Appellant has not met his burden. We are convinced beyond a reasonable doubt there was no prejudice and that there is no reasonable probability that the factfinder would have had a reasonable doubt respecting Appellant's guilt but for his civilian defense counsel's error. Based on the evidence adduced at trial there was no question that Appellant had in fact attempted carnal knowledge and indecent acts with a child, attempted to entice a minor, violated an order regarding the use of his government computer, and used indecent language.

First, the evidence supporting the charged offenses was overwhelming. The prosecution presented pornographic material taken from Appellant's computer, sexually explicit chat sessions between Appellant and an individual who said she was underage, Appellant's online profile, which included his picture, testimony that showed Appellant was apprehended at a rendezvous based on a meeting set up in the aforementioned chat sessions, and evidence that Appellant had purchased a package of condoms only fifteen minutes before the meeting. Second, no plausible defense to the *Article 92, UCMJ*, offense of wrongful use of a computer or other offense has been raised by Appellant. Relatedly, Appellant fails to tell us what he would have testified to absent his counsel's comments. Third, Appellant does not argue that his

defense at trial to the remaining charges -- that he believed he was actually talking to someone of a more appropriate age -- was in any way undercut by counsel's strategic choice. And finally, the military judge instructed the members three times that the arguments of counsel were not evidence.

While, *post hoc,* Appellant may wish that his attorney had engaged in a "useless charade," *United States v. Cronic, 466 U.S. 648, 656 n.19, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984),* given the facts of this case we conclude that there was no prejudice stemming from the fact that he did not.

III. Decision

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

CONCUR BY: EFFRON

CONCUR

EFFRON, Chief Judge (concurring):

With respect to Appellant's claim that counsel was ineffective by conceding guilt in his opening statement and closing argument as to a charge in a case involving multiple offenses, I agree that any error was not prejudicial under the second prong of *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).* The question of whether, in the military justice system, the consent of an accused is required prior to such a concession is a matter that may be deferred until a case presents a more clearly developed record on that issue. *See*

Article 45(a), Uniform Code of Military Justice, *10 U.S.C. § 845(a) (2000)*; *United States v. Honeycutt, 29 M.J. 416, 419 n.4 (C.M.A. 1990)*; *United States v. Haye, 29 M.J. 213, 215 (C.M.A. 1989)*; *United States v. Bertelson, 3 M.J. 314, 317 (C.M.A. 1977)*; *United States v. Care, 18 C.M.A. 535, 538-39, 40 C.M.R. 247, 250-51 (1969)*; Rule for Courts-Martial (R.C.M.) 811(c); R.C.M. 906(b)(10); R.C.M. 910.

UNITED STATES

v.

Major JOHN R. LARSON,
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL
APPEALS

64 M.J. 559

December 7, 2006, Decided

COUNSEL: For Appellant: Colonel Carlos L. McDade, Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Sandra K. Whittington, and Major Christopher S. Morgan.

For the United States: Colonel Cary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Jin-Hwa L. Frazier.

JUDGES: Before MOODY, MATHEWS, and THOMPSON, Appellate Military Judges. Senior Judge MOODY participated in this decision prior to his retirement.

OPINION BY: MATHEWS

OPINION

OPINION OF THE COURT

MATHEWS, Judge:

The appellant was convicted, contrary to his pleas, of one specification each of attempted carnal knowledge and attempted indecent acts with a minor, both in violation of Article 80, UCMJ, *10 U.S.C. § 880*, one specification of violating a lawful general regulation, in violation of Article 92, UCMJ, *10 U.S.C. § 892*, and one specification each of communicating indecent language and using a facility or means of interstate commerce to attempt to entice a minor to engage in sexual activity, [1] both in violation of Article 134, UCMJ, *10 U.S.C. § 934*. A panel of officers sentenced the appellant to dismissal from the service, confinement for 9 years, and forfeiture of all pay and allowances. The convening authority approved the dismissal and forfeitures, but reduced the appellant's sentence to confinement from 9 years to 6 years.

> 1 This offense, a violation of *18 U.S.C. § 2422(b)*, was charged under the "crimes and offenses not capital" clause of Article 134, UCMJ, *10 U.S.C. § 934*.

On appeal, the appellant assigns the following errors: first, that the military judge erred by denying a defense motion to suppress evidence seized from the government computer assigned for the appellant's use; second, that three of the specifications were multiplicious; third, that his trial defense counsel were ineffective; and finally, that he was entrapped by the government. [2] We find no error and affirm.

2 This issue was raised by the appellant pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).*

Background

The appellant, a 36-year-old married officer, was a satellite communication specialist assigned to Schriever Air Force Base (AFB) in Colorado Springs, Colorado. At the time of the offenses, he was a reservist on extended active duty, temporarily filling in for another officer who was deployed. The office assigned to the appellant was the same one previously occupied by the deployed officer, and still contained some of that officer's personal belongings. The office contained a computer, which was connected to the Internet, allowing the appellant to avail himself of the wide variety of services available there. This computer was programmed to display a banner stating it was government equipment and that users consented to monitoring.

One of the services accessed by the appellant was an instant-messaging (IM) feature of a major internet company. This particular IM service allows users to select a user name and to input data about themselves, including their real name, age, location, gender, and hobbies. The appellant identified himself as "Skeeler" and his location as Colorado Springs. He included his true age on his profile, but not his real name. He identified his sole hobby as "Public sex."

On 10 July 2002, the appellant struck up a conversation with "Kristin," another user of the

same IM service. He quickly learned that Kristin was 14 years old, lived in Colorado Springs, and, up until recently, owned a pet hamster. After a few minutes of further conversation, the appellant steered the topic of discussion from rodents to sex. He asked Kristin to send him a picture of herself, and, on viewing it, told her she was a "hottie." He asked Kristin if she'd ever had sex; and when she said no, he asked if she'd like to. He then asked if she masturbated, confiding that he did so "often." Kristin ended the conversation a few minutes later.

A few days after meeting her online, the appellant initiated another conversation with Kristin. He asked if they could meet in person, and suggested going to a nearby park where he claimed they could have sex without being seen. Over the course of the next week or so, the appellant urged Kristin to masturbate and to touch her anus, to describe those acts to him after the fact, and also to describe various aspects of her anatomy to him. As these discussions progressed, the appellant repeatedly discussed his desire to engage in sexual intercourse with Kristin, and asked if she would perform oral sodomy on him and allow him to anally sodomize her. Before they could meet in person, however, the appellant apparently reconsidered, writing "you know, as much as i'd [*sic*] love to meet you and hook up, i [*sic*] really don't think we should since it is illegal and i [*sic*] could get arrested if anyone ever found out . . ."

A little over an hour later, however, the appellant had another change of heart: "you know i'm [*sic*] dying to hook up with you right?" He asked if Kristin

could meet him immediately. When she told him no, he suggested the following day and she agreed. In response to her query "u [*sic*] mean we can stil [*sic*] do it?" the appellant wrote, "you have to promise me you won't tell anyone." As fate would have it, however, the appellant's duty schedule intervened, and he was unable to meet with Kristin as planned. He sent her an e-mail apologizing, and assuring her that he would "still like to get together." After more sexually explicit IM conversations, the appellant and Kristin again made plans to meet at a fast-food restaurant in a local mall. Afterward, they agreed, they would go somewhere else and have sex.

This time, the appellant kept his appointment. Upon arriving at the scheduled rendezvous point, however, the appellant was promptly apprehended by local police. It was only after his arrest that the appellant learned "Kristin" was not actually a 14-year-old girl, but was instead an undercover Colorado Springs police officer who kept verbatim copies of all the appellant's conversations with "Kristin." In a search incident to the appellant's arrest, the police discovered in the appellant's pocket a receipt for a package of condoms purchased just 15 minutes prior to his arrest.

In the days following the appellant's apprehension by the civilian police, military authorities were notified of what transpired and began their own investigation. The appellant's commander, using a master key to the government office used by the appellant, allowed agents of the Air Force Office of Special Investigations (AFOSI) to seize the government computer in that office. A

search of the computer hard drive turned up data files, stored automatically by the Microsoft Windows operating system during the appellant's Internet browsing sessions, indicating the appellant had used the computer to search the Internet for sexually-related material and obtain sexually-explicit images.

The Appellant's Trial

The appellant was represented at trial by military defense counsel and two civilian defense counsel, Mr. M and Mr. G. The defense team promptly moved, *inter alia*, to suppress evidence taken from the computer used by the appellant on the grounds that the warrantless search of this government equipment violated the appellant's rights under the *Fourth Amendment*. [3] The military judge denied that motion, and several others that would have had the effect of dismissing all or parts of the government's case, but granted several motions limiting the evidence that the government could present at trial.

3 *U.S. CONST. amend. IV.*

The appellant pled not guilty to all Charges and Specifications. In his opening statement to the members, Mr. M offered the following view of the appellant's use of his government computer:

> You're going to see that Major Larson was employed and used his computer in an inappropriate fashion. There's no question about that. That's not going to be an issue in this case. It's going to be

> conceded. Major Larson took his computer and used it inappropriately.
>
> You're going to hear that there is a regulation or rule that you are not to use your government computer for particular purposes. . . . [I]t's not going to be the defense contention in this case that Major Larson -- that it was ever intended for Major Larson to get on the computer and start going into profiles and contacting individuals in chat rooms, and profiles, and downloading photos. . . . [T]hat is not going to be an issue in this case.

Mr. M concluded his opening statement in a similar vein:

But, when it gets down to the truth of this case -- and I'm not going to get up here and try to represent something to you that's not true -- Major Larson is guilty of misusing his computer because it was never anticipated by [the appellant's superiors] that he was to use that computer for those reasons. It wasn't, and he shouldn't have done that. . . . But, he certainly never attempted to do what they're claiming he did. And we're going to ask you at the conclusion of this case to find him not guilty of those charges and specifications.

The members found the appellant guilty of all Charges and Specifications. Although they found the appellant guilty of misusing his government computer in violation of an Air Force instruction, the members excepted some of the language from the

Article 92, UCMJ, specification, finding the appellant not guilty of using the computer to view sexually explicit movies.

Discussion

1. Search of the Government Computer

The appellant complains the military judge erred by denying his motion to suppress evidence seized from the computer in the government office assigned to the appellant. We review the military judge's decision for an abuse of discretion. *United States v. Rodriguez, 60 M.J. 239, 246 (C.A.A.F. 2004).* In determining whether the military judge abused his discretion, we consider his findings of law de novo and his findings of fact using a clearly erroneous standard. *United States v. Ayala, 43 M.J. 296, 298 (C.A.A.F. 1995)* (citing *United States v. Cardenas, 9 F.3d 1139, 1147 (5th Cir. 1993)).*

The appellant's commander testified the purpose of the government office, and of the government computer, was to accord the person filling the appellant's position a place and the means necessary to conduct government business. The military judge found that access to the office and to the computer, while limited, was not restricted to the appellant, but also extended to the appellant's commander and various administrators and other personnel assigned to the unit. One of those personnel, of course, would be the deployed officer for whom the appellant was filling in, whose personal belongings remained in the office awaiting his return.

This appears to us to be a case of first impression in some respects. In military jurisprudence, the focus of *Fourth Amendment* litigation involving computers has primarily been on the expectation of privacy to be afforded to e-mail: personal communications between users, sent via computers using networks or the Internet. *See, e.g., United States v. Long, 64 M.J. 57 (C.A.A.F. 2006); United States v. Monroe, 52 M.J. 326 (C.A.A.F. 2000).* The search of the government computer here did not focus on such communications. Instead, the AFOSI searched for certain data files, created as part of the "normal operating procedure" of the Microsoft Windows operating system, which record the date, time, and Internet address of web sites visited by the computer user, as well as information about the user account in use on the computer at the time the sites were visited. [4] Such files are like a "documented history of [the user's] travels on the Internet." *United States v. Romm, 455 F.3d 990, 994 n.5 (9th Cir. 2006).*

> 4 The government expert testified that the computer was logged in using the account name and password for the user account 'larsonjr.'

The military judge concluded the appellant had no expectation of privacy in the contents of the computer. We find no abuse of discretion in his ruling. There is no evidence the appellant was aware the Internet history files existed, and we are unconvinced the appellant could entertain a subjective expectation of privacy in them without such knowledge. Moreover, we conclude such an expectation, even if it existed, would on these facts

not be reasonable. The data in question was recorded automatically, not for law enforcement purposes, but as part of the computer's operating system. The appellant could not expect to keep private automatically-recorded data stored on government property he would reasonably have known would be turned over to another officer on that officer's return from deployment. *See, e.g., United States v. Conklin, 63 M.J. 333, 337 (C.A.A.F. 2006)* (finding only a "limited" expectation of privacy in a government computer in a government office); *United States v. Tanksley, 54 M.J. 169, 172 (C.A.A.F. 2000), overruled in part on other grounds by United States v. Inong, 58 M.J. 460, 465 (C.A.A.F. 2003)* (finding "at best" a "reduced" expectation in personal computer data kept in a government office). *See also United States v. Ziegler, 456 F.3d 1138 (9th Cir. 2006)* (no expectation of privacy in employer-owned computers; survey of federal cases). The military judge did not err.

2. Multiplicity

The appellant contends his convictions under *Article 80*, UCMJ, are multiplicious with the *Article 134*, UCMJ, offense under Title 18; or, in the alternative, that they represent an unreasonable multiplication of charges. We disagree.

As our superior appellate court recently noted, *18 U.S.C. § 2422(b)* represents Congress' "clear choice to criminalize persuasion and the attempt to persuade" minors to engage in sexual activity, "not the performance of the sexual acts themselves." *United States v. Brooks, 60 M.J. 495, 498 (C.A.A.F. 2005)*

(quoting *United States v. Bailey, 228 F.3d 637, 639 (6th Cir. 2000)).* This offense was completed by the appellant's efforts to cajole "Kristin" to engage in sex acts with him. The fact that the appellant later took steps toward the actual commission of those acts is immaterial.

The *Article 80,* UCMJ, offenses, however, *did* require steps toward the completion of the acts. Those steps were not taken until several days after the Title 18 offense was complete: the appellant drove to the mall to meet with "Kristin," purchased a package of condoms and proceeded to the fast-food restaurant to keep his rendezvous. Examining the disparate elements of the *Article 80,* UCMJ, offenses and the Title 18 offense, as well as the distinct and separate facts needed to establish the appellant's guilt of each, we conclude the offenses are not multiplicious. *United States v. Teters, 37 M.J. 370, 376-77 (C.M.A. 1993).* Furthermore, we see no evidence of prosecutorial overreach in the government's charging decision. [5] *Cf. United States v. Quiroz, 55 M.J. 334, 338-39 (C.A.A.F. 2001).* There was no unreasonable multiplication of charges here.

> 5 The appellant was married at the time of these offenses, yet the government did not elect to charge him with the offense of attempted adultery. We express no opinion on the propriety of such a charge, but we are persuaded by its omission that the government exercised restraint in deciding what charges to bring.

3. Ineffective Assistance of Counsel

The appellant next complains that his counsel, Mr. M, conceded his guilt during opening statement and at other points during the trial. These concessions, the appellant claims, caused him to "completely [rule] out the option of testifying" in his own defense. As a consequence of his counsel's conduct, the appellant questions "how much preparation actually went into" his defense.

We analyze claims of ineffective assistance of counsel under the framework established by the Supreme Court in *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).* Counsel are presumed to be competent. The presumption of competence may be rebutted by a showing of factual errors unreasonable under prevailing professional norms. The appellant bears the burden of establishing that his trial defense counsel were ineffective. *United States v. Garcia, 59 M.J. 447, 450 (C.A.A.F. 2004); United States v. McConnell, 55 M.J. 479, 482 (C.A.A.F. 2001).* If the conduct of the trial defense team is sufficiently egregious that it results in "a total breakdown of the adversarial process," no further showing of prejudice is required. *United States v. Hennis, 40 M.J. 865, 867 (A.F.C.M.R. 1994)* (citing *United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)).* When the alleged lapse in judgment or performance does not rise to this level, we test for prejudice. *Strickland, 466 U.S. at 687. See also United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991).*

Our review of the record leaves us unconvinced that the appellant has carried his burden. Although

Mr. M did concede elements of the *Article 92*, UCMJ, offense, he told the members that the appellant "certainly never attempted to do what they're claiming he did," and urged them to find the appellant not guilty on all of the Charges and Specifications. The members clearly did not take Mr. M's comments as a blanket concession of guilt. Instead, they found the appellant guilty of the *Article 92*, UCMJ, offense by exceptions, acquitting him of some of the conduct alleged by the government. Thus, we cannot say the adversarial process was completely broken.

In fact, Mr. M and the other members of the appellant's trial defense team conducted an extraordinarily vigorous effort on the appellant's behalf, making over a dozen motions, orally and in writing, challenging every aspect of the government's case. They even took the unusual step, when a new military judge took over the case after a lengthy recess in the proceedings, of asking the new military judge to reconsider and reverse an adverse ruling made by the original judge. Although unsuccessful in most regards, they were able to win the exclusion of some of the government's evidence. There was no unconditional defense surrender, as envisioned by *Cronic* and *Hennis*.

Nor do we find the defense counsel's conduct deficient under *Strickland* and *Polk*. According to an affidavit from Mr. M., provided by government appellate counsel, the defense team concluded there was no plausible defense to the *Article 92*, UCMJ, charge. Analyzing the entire record, we are unable to find fault with their analysis. The appellant's

counsel further concluded that asserting a flimsy defense on this charge -- the least serious of those faced by the appellant -- would damage their ability to plausibly maintain the appellant's innocence against the more serious charges. We generally will not second-guess such tactical decisions made to seize and retain credibility with the members, particularly when, as here, the trial defense team's efforts are directed toward minimizing their client's punitive exposure. *United States v. Hansen, 36 M.J. 599, 611 (A.F.C.M.R. 1992).* The appellant's counsel were not ineffective.

4. Entrapment

Finally, the appellant insists his conduct was the product of entrapment by the government. For the appellant to prevail, there must be evidence the government agents -- here, the Colorado Springs police -- induced the appellant's behavior, and that the appellant was not otherwise predisposed to commit the offenses. *See* Rule for Courts-Martial 916(g); *United States v. Howell, 36 M.J. 354, 359 (C.M.A. 1993).* Inducement, in this context, means more than merely providing the appellant the means or opportunity to commit a crime, or deploying artifice or stratagems such as pretending to be someone other than a government agent. Only "circumstances suggesting overreaching by [the] government . . . or any pressuring . . . of the appellant to commit these offenses" will suffice. *Howell, 36 M.J.at 360.*

Examining the record de novo, we find the appellant was not entrapped. The Colorado Springs

police officers who created the persona of 14-year-old "Kristin" did nothing to pressure the appellant, nor did they overreach. Indeed, it was the appellant who sought out "Kristin" and initiated a conversation with her, brought up the subject of sex, and asked her to engage in sex with him. When she seemed reluctant to engage in anal sex, or sex in a public place as the appellant asked, he assured her that he would stop if she wanted him to stop and that they wouldn't be caught. The appellant specified the date and time of their rendezvous, the place they would meet, and even the clothes "Kristin" would wear. In short, far from being pressured, the appellant was firmly in the lead. Moreover, from the biographical information he entered in his user profile to his eager pursuit of "Kristin" in their IM conversations -- telling her he "really, really" wanted to get together with her and that he was "dying" to "hook up" for sex -- the evidence as a whole shows appellant was plainly acting on his own initiative and in furtherance of his own predispositions. There simply was no entrapment here. [6]

> 6 We do not find it necessary to consider the materials seized from the government computer in resolving the question of entrapment. Those materials, which included dozens of user profiles of girls "Kristin's" age, served to undermine the appellant's claims. Because the appellant's proclivities were so clearly displayed by his online conversations with "Kristin," however, exclusion of the seized material would not have affected the result.

Conclusion

The findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, *10 U.S.C. § 866(c); United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000)*. Accordingly, the findings and sentence are

AFFIRMED.

Senior Judge MOODY participated in this decision prior to his retirement.